#1771

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Tony C. Mock

Case No. 27-23 (20031217) 1250-01-03

Date of Hearing: May 27, 2004

Place of Hearing: Chillicothe, Ohio

APPEARANCES:

For the Union:

Advocate: Dave Justice

Witnesses:

Mal Corey
Tony Mock

For the Employer:

Advocate: Michelle Ward
2nd Chair: Joe Trejo

Witnesses:

Dave Baker
Michelle Ivey
Patrick Hurley

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: July 9, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support removal of the Grievant, Tony Mock ("Mock"), for violating DR&C rules regarding actions that could compromise the ability of an employee to effectively carry out his duties and failure of good behavior/immoral conduct.

The removal of the Grievant occurred on December 11, 2003, and was appealed in accordance with Article 24 of the CBA. This matter was heard on May 27, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits, with the record being closed as of May 27, 2004.

BACKGROUND

The Grievant was employed by the State of Ohio for over eleven (11) years. He initially worked as a food service worker for fifteen (15) months and the remainder of the time as a corrections officer (CO). The Grievant worked at the Ross Correctional Camp (Ross) as a shakedown officer in the visiting room at the time of his removal. He was responsible for conducting screening/searches to ensure that contraband or drugs was not brought into the facility during visits by third parties.

The Grievant was removed for off-duty conduct, which occurred on February 23, 2003. The DR&C work rules cited are Rule 37 - regarding the ability of an employee to effectively carry out his/her duties as a public employee and Rule 49 – regarding violations of ORC §

124.34 and failure of good behavior or immoral conduct. At the time of the removal, the Grievant had no current discipline of record.

At 2:11a.m. on February 23, 2003, the Grievant, while off-duty, was stopped by Circleville police officers after he was observed weaving, making a wide left turn and having problems shifting the gears, causing his car to jerk. (Joint Exhibit ("JX") P, p.2). According to the police report, a faint odor of alcohol was detected on the Grievant, and a strong odor of alcohol was present in the car. A field sobriety test was administered in which his balance and dexterity were an issue, and the Grievant admitted to drinking about half a beer one hour prior to the stop.

The officers believed the Grievant was under the influence of alcohol, or something, and he was placed under arrest for operating a motor vehicle under the influence (OMVI). During a pat down search, officers discovered a piece of copper cleaning pad in his coat pocket. Since this material could be associated with drug paraphernalia, a canine check of the Grievant's vehicle was conducted. The canine check resulted in an 'alert' on the driver's side window, but a search of the vehicle did not reveal any drugs.

The Grievant was transported to the Pickaway County Jail where a Breathalyzer test was given. The test was negative for alcohol. The Grievant was then taken to the Circleville City Jail where he was requested to take a urine screen. The Grievant was escorted to the bathroom where a urine sample was obtained.

While in the bathroom, the Grievant was observed reaching into his pants and removing a plastic bag, which he placed into the toilet paper dispenser. A search of the dispenser revealed two (2) small baggies containing substances that appeared to be crack cocaine. The Grievant initially denied that the baggies belonged to him, but later admitted that they were his property and verbally confirmed that it was crack cocaine. A further search of the Grievant's clothes uncovered several pieces of burnt copper cleaning pad and several small pieces of crack cocaine. (JX P, p.3). The laboratory report of the substances confirmed that it was

cocaine, and the toxicology analysis of the Grievant's urine sample tested positive for cocaine as well. (JX R, JX S).

The Grievant was charged with two felonies: possession of cocaine and tampering with evidence, in addition to several traffic violations, e.g. improper left turn, marked lanes and OMVI. (JX P, pp.1-3).

On February 24, 2003, in accordance with Rule 26, the Grievant completed an incident report notifying the DR&C of his arrest. The Grievant was immediately placed on administrative leave pending outcome of the criminal matter, in accordance with Article 24 of the CBA. On May 2, 2003, the Grievant was indicted by the Pickaway grand jury on two (2) felony charges, i.e., possession of cocaine and tampering with evidence. The Grievant entered pleas of not guilty to possession of cocaine and attempted tampering with evidence, felonies of the fourth degree. The traffic charges were dismissed.

On June 2, 2003, the Grievant requested intervention in lieu of conviction on both felony counts. The Grievant agreed to enter a guilty plea and the court deferred sentencing and ordered a pre-sentencing investigation report to determine if the Grievant was amendable to intervention in lieu of conviction. On October 3, 2003, the Grievant was sentenced to three (3) years probation in lieu of conviction with several court imposed conditions attached to the order. (JX M, p.1).

On October 6, 2003, the Grievant was interviewed at Ross by investigators David Baker ("Baker") and Gary Sorrell ("Sorrell"). The Grievant was represented by Mal Corey ("Corey"), Union Steward. A written statement was obtained from the Grievant who admitted that he pled guilty to both felonies, but also stated, in part, the following:

> *"...[I] had a cloth bag in my jacket pocket, which belonged to the driver of the vehicle that I was driving at the time,....I, myself, pulled the bag out of my pocket, because I did not realize I had drugs in them..." (JX3,p.1)*

On November 7, 2003, a pre-disciplinary conference was held wherein the Grievant was charged with violations of DR&C Rules 37 and 49, and the hearing officer determined that just

cause existed to discipline the Grievant. (JX3, p.3). On December 11, 2003, the Grievant, was removed from his position as a CO by Patrick Hurley ("Hurley"), Warden, for the rule violations cited above.

The Union contends that the penalty was too harsh in that the Grievant was a CO in good standing and a choice of penalty ranges provided for discipline less than removal under Rules 37 and 49.

ISSUE

Was the Grievant, Tony Mock, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DR&C RULES
ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 37 and RULE 49

Rule 37: Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.

OFFENSE

1st	2nd	3rd	4th	5th
2 or R	2 or R	5 or R	R	

Rule 49: Any violation of ORC 124.34 - ...and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

OFFENSE

1ST	2nd	3rd	4th	5th
2 or R	5 or R	10 to R	R	

POSITION OF THE PARTIES

POSITION OF THE UNION

The Union basically contends that the Grievant, a long-term employee with good evaluations and no active discipline of record, simply made a mistake. The Grievant had performed his duties in a professional manner for over eleven (11) years, but was having problems at home during this period.

Regarding the February 23, 2003, incident, the Grievant testified that he was experiencing personal problems and consequently made several bad decisions. However, since February 23, 2003, he has complied with the court's probation plan in an effort to make him a better person. Examples include: enrolling and completing an EAP program for drugs counseling prior to February 23, 2003; completing a drug program under Scioto Paint Valley Mental Health Center ("Scioto"); and continuing to voluntarily receive counseling even after the Scioto program was completed. (Union ("UN") Ex5, pp.1-3). The Grievant further testified that pursuant to his probation requirements, he physically sees his probation officer every two (2) weeks.

The Union contends that DR&C failed to consider any mitigation principles prior to removing the Grievant based upon the preceding factors and the imposed discipline is not commensurate with the violations of Rules 37 and 49. The Union submits that both rules have a

range of penalties from oral/written reprimand to removal for the first offense. Simply, just cause did not exist to justify removal.

The Union seeks reinstatement and/or modification of the removal in this matter.

POSITION OF THE EMPLOYER

The Employer submits that as a CO, the Grievant is responsible for carrying out the DR&C objective of providing a safe and efficient rehabilitation/correction system for inmates, co-workers, and the public. Ross is one of thirty-three (33) facilities operated by DR&C within the State of Ohio.

The Ross main compound area houses the high level more serious offenders, whereas the camp area, where the Grievant worked, generally houses the shorter-term inmates. Hurley indicated that approximately 2,000 inmates are assigned to Ross, and that about ninety (90%) percent have had alcohol/drugs as a part of their criminal history.

To that extent, CO's are required, by training and written policy, to conduct themselves at all times both on and off-duty in a manner that will not affect their ability to perform their duties. (JX4, p.2). Michelle Ivey ("Ivey"), Labor Relations Officer, testified that the Grievant and the other employees at Ross received the Revised Standards of Employee Conduct ("Rules") in December 2001, which contained the written policy governing off-duty conduct. (JX3, W). The Rules included a section on personal conduct regarding on and off-duty and the prohibition against the use, possession, or distribution of illegal drugs *"at all times"*. (JX4, p.2 **emphasis added**).

Hurley, a twenty-three (23) year employee of DR&C, and a warden at other various institutions, indicated that off-duty conduct of a CO is extremely important because of trust, security protocol and public confidence. Simply, if on or off-duty activities subjects an employee

to lack of trust by inmates or co-workers, it compromises the ability of that CO to be effective, according to Hurley.

Regarding the events of February 23, 2003, and thereafter, the facts are not in dispute that the Grievant had illegal drugs in his possession and tested positive for cocaine evidenced by his urine test. The Grievant pled guilty to possession of cocaine and attempted tampering with evidence with the convictions held in abeyance if the Grievant successfully completed the terms of his three (3) year probation.

The Employer contends that the Grievant's off-duty personal conduct constitutes a violation of Rules 37 and 49 and that the just cause standard was satisfied under Article 24 of the CBA. In fact, the Grievant was assigned as a shakedown officer and his primary duty was to keep contraband form entering Ross through visitors. To underscore the importance of monitoring contraband at Ross, Hurley stated that one of the top security priorities is to keep drugs out and/or search for drugs inside the prison by conducting periodic cell tosses. To Hurley, the Grievant's conduct on February 23, 2003, constituted actions that compromised his ability to effectively perform his duties.

Finally, DR&C analyzed the range of discipline under Rules 37 and 49 and concluded that consistent with past practice [1], the magnitude of the Grievant's actions on February 23, 2003, the ongoing struggle to keep staff at a level of integrity/trust, and the requirement that staff not be perceived by inmates in any compromising manner, that removal was the only remedy applicable.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the Employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th Ed., 1997).

[1] During cross-examination, Hurley testified that another CO had been removed who was at a house when it was raided for drugs.

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter, including all of the testimony and evidence of both parties, I find that the grievance must be denied. My reasons are as follows:

In this matter, the underlying facts are not in dispute. The ability of DR&C to utilize off-duty conduct to constitute violations of its work rules for the establishment of "just cause" under Article 24.01, sufficient to sustain the Grievant's removal will be analyzed.

Discipline for off-duty conduct for public sector employees is guided by the essential principle of whether a direct relationship exists between the improper off-duty conduct and the employment relationship. New York Department of Correctional Services 87 LA 165,166 (1986, Babiskin). In other words, a substantial relationship must exist between the off-duty misconduct and the employment. Id. at 167. Moreover, the use of drugs accompanied by any public notoriety by a person sworn to uphold and enforce the laws of the State, are generally acceptable grounds for removal. See, City of Wilkes-Barre, 74 LA 33 (1980, Dunn).

The Grievant, as a shakedown officer for the visiting room, was responsible for ensuring that drugs or other contraband did not enter the facility. Given the Grievant's tenure and training

as a CO for over eleven (11) years, I find that the Grievant was aware of the prohibition against the use or possession of illegal drugs while off-duty and that a substantial relationship existed between the Grievant's off-duty misconduct and his job as a CO, clearly making the work rules applicable to the February 23, 2003 misconduct. Furthermore, the Grievant, less than fourteen (14) months earlier, received a copy of DR&C's written policy which specifically prohibited a CO from being involved in the drug activities he pled guilty to. (JX 3, W).

Hurley, testified unrefuted and credibly that other CO's and inmates were aware of the reasons for the Grievant's arrest, placement on administrative leave and subsequent removal. The public notoriety attached to the Grievant's criminal matter is only required to be "slight", not substantial. City of Wilkes-Barre, 74 LA 33, 35 (1980, Dunn).

I find that just cause existed to discipline the Grievant for his off-duty conduct on February 23, 2003. Given the applicability of the work rules to the misconduct and the 'slight' public notoriety attached to the misconduct, I will now address whether or not removal was the appropriate discipline.

The Union, argues for a variety of reasons, that the Employer failed to properly consider issues of mitigation and/or that the removal is not commensurate with the offense. The Grievant admitted, at the hearing, that stress and personal problems at home contributed to his drug use, but due to counseling, he's put all of that behind him. The Union argues that no active discipline, good performance evaluations and long service were issues to mitigate against removal. I disagree.

Conversely, DR&C argues that a CO, sworn to enforce the laws of the State of Ohio with the specific responsibility of preventing contraband from entering the facility, cannot be allowed to work in an environment where drug use or detection is one of DR&C's chief concerns. Given the off-duty misconduct, how effective would he be with co-workers or inmates having been compromised due to his illegal drug use. DR&C further contends that the Grievant can not serve as a role model to inmates when he not only used drugs, but also attempted to hide his

criminal conduct from other peace officers. I concur with DR&C, that the Grievant's conduct on February 23, 2003, compromised his ability to effectively perform his duties as a CO and just cause existed to discipline him.

In New York Department of Correctional Services, supra, Arbitrator Babiskin was faced with a fact pattern similar to the instant matter. Like Mock, the Grievants were employed as CO's by the State of New York. Like Mock, the Grievants were off-duty when they used cocaine. Further, like Mock, their removal was the first formal discipline taken against them. The Grievants in New York Department of Correctional Services had good performance evaluations and exemplary work records. Arbitrator Babiskin stated, "correction officers are law enforcement officials. They are peace officers under applicable law. Grievant's conduct on August 23, 1985, was and is in direct conflict with the duties and responsibilities of a CO". Id. at 167. Peace officers are public figures in a defined sense that they are held by the general public to a higher standard of respect for and adherence to the law.

Similarly, in New York State Department of Corrections, 86 LA 793 (LaManna, 1985), faced with off-duty misconduct of a CO, Arbitrator LaManna stated: "that expectation speaks to their general charge and becomes a part of the 'public trust', so that violations of the law by off-duty police officers creates more devastating and widespread impact than would the same or similar action by an average citizen: fellow police officers unfairly suffer for the improper acts of their colleagues, suspicion spreads about other police agencies, and a dangerous general lack of respect for the law follows." Id. at 797. I agree.

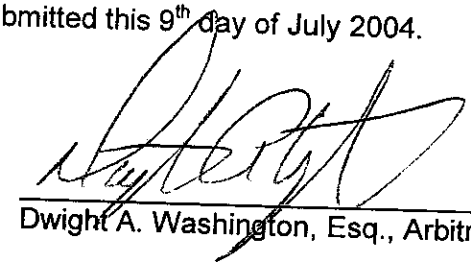
DR&C made a business decision that the Grievant could no longer effectively serve as a CO. Balancing all of the factors listed above, I cannot find that the penalty is excessive, arbitrary or unreasonable. The Grievant's conduct on February 23, 2003, was and is in direct conflict with his duties as a CO. The Grievant admitted to the use and possession of cocaine and attempted to hide drugs/drug paraphernalia while in lawful custody. I find that just cause existed for the removal of the Grievant.

The Grievant had a duty to enforce the law and the very subject matter of his off-duty misconduct was identical to his job duties. This opinion should not suggest that a substantial relationship could exist between every public job and the off-duty misconduct, but the facts in this matter satisfied the substantial relationship test to deny this grievance.

Therefore, for all the reasons cited above, the grievance is denied.

AWARD

Grievance denied. Respectfully submitted this 9th day of July 2004.



Dwight A. Washington, Esq., Arbitrator